United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2100

To Be Argued By Terence Brown

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee

v.

FORREST GERRY and RICHARD PERRY, Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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ISSUES PRESENTED

1. Whether the evidence was sufficient to support the convictions. (Gerry I. A; Perry I)

2. Whether the alleged instances of prosecutorial misconduct, and rulings of the trial court relative thereto, constitute reversible error. (Gerry I.C, D, II; Perry III,IV,V,VI)

3. Whether the trial court erred in various evidentiary rulings. (Gerry I B,E,F,G,H; Perry II, VIII, IX).

4. Whether the government's closing argument and the court's charge were proper. (Gerry I I, J; Perry VII).

STATUTE INVOLVED

18 U.S.C. 224 reads in pertinent part:

> § 224. Bribery in sporting contests
>
> (a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

STATEMENT

Following an eleven-week jury trial in the United States District Court for the Eastern District of New York (Judd, J.), defendants Forrest Gerry and Richard Perry [1/] were convicted of influencing the outcome of harness races by bribery (count 1) and of conspiring to do so (count 2) in violation of 18 U.S.C. 224. Defendant Gerry was sentenced to concurrent terms of four years' imprisonment. Defendant Perry was sentenced to concurrent terms of two and one-half years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(2). In addition, both defendants were fined $10,000 on each count.

1/ The grand jury indicted 28 individuals. Of these, one was a fugitive at the time of trial (Michael Sherman); when subsequently arrested he pled guilty. Five others were severed prior to trial, one of whom (Seymour Rothstein) pled guilty during the trial. Six were dismissed during the trial and fourteen were acquitted.

1. The evidence adduced at trial revealed that from January until April of 1973, Gerry, Perry, and others conspired to bribe New York harness race drivers to finish in specified positions, usually out of the money, in superfecta races[2/] then being run. Gerry, after offering bribes to certain drivers to insure that one or more horses would be in a specified position, would then bet large sums of money covering all possible combinations in which those horses were in the appropriate position (T. 136-143, 1089, 1186-1197, 1780-1781, 1924-1925, 2223-2235, 2520). The actual betting would generally be accomplished by Gerry relaying the combinations to other gamblers, including Perry and co-defendant Kraft,[3/] who would place the bets themselves or through others (T. 1835, 1844, 2116, 2198-2199, 2238-2239, 3573-3574, 3588-3589, 3949, 4217-4219). However, Gerry also bought large numbers of superfecta tickets himself[4/] (T. 1924-1925, 1955, 2198-2199, 2223, 2370-2371).

2/ A superfecta is a race in which a winning bettor must select the first four horses, in their order of finish (T. 521).

3/ Kraft pled guilty to sports bribery and testified as a government witness (T. 4278).

4/ Gerry's betting was so heavy that when he entered the Off Track Betting Office, which occurred nightly, the teller would normally open up a window just for him (T. 1925-1926).

The gamblers would normally have others cash the winning tickets and sign the necessary IRS forms, sometimes under fictitious names (e.g., T. 395-503, 3349-3350, 3477-3478). When a gambler such as David Kraft won, he would then return a portion of the winnings to Gerry (T. 4235, 4255). In the approximately three and one-half months of the conspiracy, Gerry was responsible for over $1,000,000 in bets with gross winnings of approximately $2 1/4 million (T. 1311, 1679).

Specifically, the evidence revealed that on January 24, 1973 Gerry approached harness driver Allen Cantor at a diner and, after inquiring as to how his horse would do that evening, offered him $1,000 or a winning superfecta ticket if he would agree to have his horse finish in the last four (T. 133, 135-139, 142). Cantor agreed and his horse finished seventh that night (T. 139). The next night Gerry paid him $800 (T. 142-143)[5/].

In March of 1973, a similar event occurred when Gerry called a harness race driver named Randolph Perry and asked to meet him at a diner that evening (T. 241). The following colloquy then occurred (T. 240-241):

> Well, we had a conversation, and he (Gerry) asked me how my horse was that particular night. I told him I liked him.

5/ On cross-examination Cantor testified that he did not hold back his horse, rather that he tried to win (T. 171). He also indicated that he did not know whether Gerry was joking (T. 176).

He said that's -- how -- how he's going to perform that night. I told him I thought he had a good shot.

He said, "That's too bad, because if you didn't like him I could hit the superfecta."

I said, "I like him."

He said, "Do you want to make a thousand dollars?"

I said, "No." But I thought he was just trying to see how my horse was. I told him no; he said he was only kidding around anyway, not talking serious, "I was just trying to see how honest you were, forget about it."

Perry's routine during the conspiracy consisted of his procuring a "tout sheet" for that evening's races and then waiting at his house for Gerry's call. During Gerry's call Perry would make a circle next to the dead horses (the ones which were to finish out of the money) and an X next to those which should be "keyed" (T. 3573-3575). Following the call Perry would relay that day's combinations to Michael Sherman (T. 3585). Perry would then give Bruce Cussell between $9,000 and $15,000 to bet on the combinations he had marked down (T. 3588). Cussell would purchase the tickets and hand them over to Perry (T. 2436, 2451, 3589); then Perry and Cussell would go to the race track (T. 3589). After the race, Perry would pass the winning tickets on to others to be cashed (T. 3615), although sometimes he and Gerry cashed the tickets themselves (T. 1998, 2169, 2461-2462).

During the conspiracy, Perry acknowledged to his assistant, Bruce Cussell, that Gerry was "fixing the supers" by offering harness drivers their choice of either $1,000 or a winning superfecta ticket in exchange for their promise to finish out of the money (Tr. 3576, 3578, 3609-3612). In addition, the jury heard the testimony of FBI Agent Sean Hilly, who overheard a conversation between Gerry and David Kraft, another gambler, in which the former acknowledged that he was paying off the drivers and that he had taken the precaution of not being seen with more than one driver at any one time (T. 1754-1757, 1780-1781). Kraft testified to similar admissions by Gerry (T. 4237, 4258-4259, 4315-4316, 4341-4342).

2. During the trial three witnesses, who had agreed to testify for the government, recanted prior trial or grand jury testimony.

a. Seymour Rothstein testified as a government witness on April 23, 1974 (T. 5090-5133). He indicated that he cashed tickets for Gerry during the period charged in the indictment (T. 5096-5097, 5100-5101, 5106-5108) and that Gerry had made statements in relation to his large bets such as "I got the little prick [referring to a driver] in my hip pocket" (T. 5116) and "I am no fool, I know what I am doing" (T. 5120-5121). The defense did not cross-examine him (T. 5133-5134).

On May 10, 1974 Rothstein received a suspended sentence pursuant to his guilty plea (T. 7760). On May 15th he was called as a defense witness (T. 8297). At this time he testified that much of his previous testimony was false (T. 8298-8299, 8301).

b. Joseph Pullman, a gambler and contact man between Gerry and Kraft, testified at trial under a grant of immunity. He denied that his previous grand jury testimony was accurate, claiming that he had been coached through signals from the prosecutors during his grand jury appearance [6/] and that he had been coerced by the prosecutors into perjuring himself (T. 6506, 6736, 6924, 7084). He was uncooperative on direct examination, continually claiming that he did not remember and that neither the FBI 302 reports of his interviews nor his grand jury testimony refreshed his recollection (see, e.g., T. 6622-6627, 6791). The court, with the acquiescence of defense counsel (T. 6655-6656), allowed the government to read his grand jury testimony to the jury. The grand jury minutes corroborated the government's allegations that Gerry was bribing drivers and in addition linked various driver defendants to the conspiracy (T. 6660-6703).

6/ Several of the grand jurors testified that they had observed none of the signals which Pullman alleged the prosecutors had used nor did they observe the witness pause to look at the prosecutors (T. 7108-7109, 7115, 7123-7125).

c. After the government closed but before the defense case began, Marvin Proman, one of the two missing government witnesses (Michael Sherman was the other), was located and brought back from California to testify (T. 7486-7487, 7724). Proman, a groom and trainer, similarly indicated that his previous grand jury testimony was false and the result of threats of prosecution (T. 7788, 7814). In his grand jury testimony, admitted over objection, he stated that Michael Sherman had offered and he had accepted money to bribe harness drivers Cantor and Ross to finish out of the top four in a superfecta race [7/] (T. 7797, 7807, 7811-7812). He had also testified before the grand jury that Sherman informed him that the money for Cantor and Ross had come from Forrest Gerry (T. 7839).

3. The thrust of the defense case, both in their cross-examination and in their case in chief, was that the enormous profits were not attributable to bribery, but to excellent handicapping by Gerry (e.g., T. 4056, 4650, 4988, 8042-8043, 8444-8447, 8453-8455). The defense attempted to show that just one or two drivers could not fix a race (e.g., T. 233, 8755) and that even if they could physically manage to do so, they would be detected by the industry's safeguards (e.g., T. 8349-8350, 8440-8444, 8659). None of the defendants testified in their own defense.

7/Cantor had corroborated this version of events (T. 155-158).

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS.

Defendant Perry contends (Perry, p. 27) that the evidence was insufficient to support his conviction while Gerry, although acknowledging that the evidence as to him was sufficient, argues that the government case was weak (Gerry, p. 21). When the evidence is viewed, as it must be, in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), it is apparent that both these claims are without merit.

Two drivers testified that Gerry had approached them and offered them money if they would finish out of the running in the superfectas (T. 136-138, 240-241). One of them accepted and Gerry subsequently paid him $800 for finishing seventh (T. 139, 142-143). David Kraft, a gambler, testified as to various incriminating statements made by Gerry (T. 4237, 4258-4259, 4315-4316, 4341-4342), as did an FBI agent (T. 1754-1757, 1780-1781)[8/] In addition, recanting witnesses Rothstein (in his

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8/ As previously noted, Gerry, after bribing the drivers, would, in addition to placing bets, relay the information to Kraft and Perry who would in turn place substantial bets and often relay the information to others (Supra, pp. 3-5).

direct testimony during the government's case-in-chief) and Pullman (in his grand /jury testimony) had inculpated Gerry (T. 5116, 5121, 6661-6662, 6666, 6691). Finally, there was corroborating testimony from bank tellers and clerks at the Off Track Betting Offices that Rothstein, Pullman, Sherman, Cussell and others (all of whom were linked to Gerry) placed a large quantity of bets and cashed winning tickets during the period charged (e.g., T. 396-405, 488-493, 1789, 1835, 1913-1916, 2116, 2198-2199, 2238-2239, 2707, 3096, 3551).

In his brief (p. 27), Perry concedes that the evidence established that he received the betting combinations from Gerry and would then bet large sums of money. He argues, however, that his behavior was consistent with a handicapping scheme. This argument is belied by the testimony of Bruce Cussell,[9/] Perry's assistant during the conspiracy. As previously noted, Cussell testified that Perry acknowledged his own awareness that Gerry's success in selecting winning superfecta combinations was the result of bribery rather than handicapping expertise (T. 3571-3579).

In addition, Perry's attempts to conceal his identity in the bulk of his winnings by having other people, such as Cussell, buy and cash the tickets, cast doubt on his claim that

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9/ As noted infra, p. 41, Perry's claim that Cussell was not competent to testify is insubstantial.

he believed he was involved in a handicapping scheme. These attempts to conceal his behavior appear to be more consistent with the illegal behavior charged, than with the tax evasion explanation posited by him. If his only motive was to avoid the tax consequences, as he claims in his brief (p. 27), it is not apparent why he would not have used the technique the "ten percenters" used; that is to accumulate a sufficient quantity of losing tickets to offset any wins and to thus avoid any additional income taxes (T. 5101-5106). This would certainly be less expensive than the elaborate procedure he used which often required him to pay up to 10% of his winnings to others in exchange for cashing his tickets. In short, the evidence against both Perry and Gerry was clear, convincing and sufficient to support their convictions.

II

THE ALLEGED INSTANCES OF PROSECUTORIAL MISCONDUCT, AND THE COURT'S RULINGS RELATIVE THERETO, DO NOT CONSTITUTE REVERSIBLE ERROR.

Defendants' claims of prosecutorial misconduct generally revolve around a series of conversations at the Brooklyn Strike Force Office on April 18, 19, and 21. The conversations were surreptitiously recorded by Joseph Pullman, an indicted co-conspirator who was severed prior to trial when he agreed to plead guilty and testify for the government. After the trial began Pullman met with counsel for Gerry, and agreed to wear a tape recorder into the strike force office (T. 5294-5295).

On April 24 defense counsel requested and were granted a hearing with the court, from which the prosecution was excluded (T. 5265). Part of this ex parte hearing was transcribed. (See six-page, separately paginated transcript dated April 24, 1974, hereinafter referred to as ex parte hearing.) There, defense counsel revealed that Pullman had secretly recorded conversations in the prosecutor's office and they turned over three such tapes to the court. Counsel for Gerry requested that the government not be immediately informed of the recordings, since Pullman expected to be granted immunity by 12:30 p.m. that day (Ex parte hearing, 4-6).[10/]

That afternoon the court informed the government (T. 5275-5277) and marked the tapes as defense exhibits (T. 5278). In the discussion which followed, the defense asked the court to:

> ". . . dismiss this case . . . [we do not ask for a mistrial] . . ." (T. 5283) and to . . .
>
> * * * * *
>
> . . . immediately order a forthwith hearing and order the prosecution to bring in Mr. Pullman so you can ask him the questions . . .
>
> THE COURT: Yes, so far all I have is some . . .
>
> MR. ROSEMAN: I ask Your Honor . . .
>
> THE COURT: . . . pieces of evidence and statements by defense counsel.
>
> MR. ROSEMAN: But isn't this the best way to arrive at the truth, Your Honor, since we have been . . ."
>
> THE COURT: I think I probably should." [T. 5284-5285]

The jury was then excused for the day and the court prepared to listen to the tapes with Pullman authenticating them

10/Pullman was granted immunity on May 1 (T. 6392) and testified on May 2 (T. 6443).

T./ 5285-5289. Although Pullman could not be located that day (T. 5293, 5337), the rest of the afternoon was spent listening to the tapes with the court, defense counsel, several of the agents (T. 5294), and the prosecutors present (T. 5339-5344). At one point the court stated: "I haven't been able to understand much of this..." (T. 5344), and "Generally, when I've heard tapes, I've had the benefit of a transcript, which purports to say whose voice is on . . ." (T. 5344-5345), to which counsel for Gerry replied, "I haven't had the time, your Honor" (T. 5345). For the next several hours the court and counsel continued listening to the tapes (T. 5345-5350). The court then indicated that although it was improper for the prosecutor to have informed a prospective witness that the court had written a letter of recommendation in the prosecutor's behalf (T. 5350), he felt that the defense accusations were "overstated" (T. 5347) and did not support a motion to dismiss (T. 5351), but that he would further consider the question (T. 5361). He then indicated that the defense should prepare transcripts ". . . because if these are going to be used on cross-examination, there should be a transcript" (T. 5362).

At this point several of the defense counsel suggested that the prosecutors and agents should take the stand, but Gerry's counsel pointed out that the Clerk was not present and this issue was not pursued (T. 5362-5363). The session ended with one defense counsel expressing the view that the court should "have a transcript and hear the tapes" prior to ruling (T. 5366) and counsel for Gerry stating ". . . if we need them transcribed, then we'll try and make arrangements to see what we can do" (T. 5367).

The following morning (Thursday, April 25) the court reiterated that the contents of the tapes did not warrant dismissing the indictment (T. 5374), but that he intended to have someone work on making transcripts over the weekend (T. 5372). On Monday morning (April 29) the court informed counsel that he had completed "about 70 pages of transcript, which is an incomplete, rough first draft, without designating accurately who was speaking at any time" (T. 5637). He also emphasized that it was not his responsibility to prepare accurate transcripts, which he viewed as a predicate to playing the tapes for the jury:

> THE COURT: I am not going to undertake the burden of transcription. I'm not -- I think I should not permit the use of any tapes until all tapes relating to alleged prosecutorial misconduct have been made available,11/ including transcripts.
>
> And it should be up to the defendants to prepare them. [T. 5650] [Footnote added.]

11/ This reference to other tapes apparently refers to several colloquys in which Gerry's trial counsel, Mr. Bobick, indicated that he had not turned over all the conversations which Pullman had recorded.

> "[Bobick] There is a tape also available between Mr. Pullman and Mr. Rothstein, it is not on the --
>
> THE COURT: Is that the one Mr. Pollack wanted before, and which you weren't going to give him?
>
> MR. BOBICK: No, that is a different one . . . [T. 5353]
>
> * * * * *
>
> [Pollack] I further say to your Honor, that I believe there are additional tapes with Mr. Pullman, a week ago tonight in my office, with Mr. Pullman, Mr. Meyerson, myself and Mr. Dillon were present at a conversation, along with Mr. Fanning.
>
> In regard to the issue of prosecutorial misconduct levied against the prosecution, I

By May 7, the court had apparently finished its rough draft of the transcripts (T. 6980, 7207) and had already furnished re-

(Con't.)

"believe that that tape would be vital to a Court's determination of the issue, and if not, I will have to produce Mr. Dillon to testify to the content of that conversation.

THE COURT: Mr. Bobick, is there another tape?

MR. BOBICK: I don't have another tape on the conversation that he talks about.

MR. POLLACK: I asked --

THE COURT: My question is, is there another tape?

MR. BOBOCK: [sic] There are lots of tapes, your Honor. There are plenty of tapes. We have lots of tapes, but he asked for a tape involving him, Mr. Dillon, Mr. Fanning and Mr. Pullman.

I say that I do not have that tape. [T. 5638-5639]

* * * * *

[THE COURT] And the final question is whether there are additional tapes, and before I would permit the defense to authenticate the presentation and use them, I think there should be some disclosure as to whether at least there are additional tapes taken in the office of the prosecutor --

MR. BOBICK: Why? I object to that. I don't think it is important or relevant. Any tapes I have, I have. Anything I offer in evidence, I offer in evidence. I don't think one thing has anything to do with the other. If you have the tapes and you have to hear them and have transcripts, at that point you make your ruling.

If I offer tapes, I will ask them to do what they have to do. At that point, I will introduce them. As far as the only thing we turned over to you were the three tapes, we felt they were proper for you to have." [T. 6287-6288]

* * * * *

Counsel subsequently turned over a blank tape which purported to be the tape which was in the machine on the 22nd (T. 7773, 7783-7784).

recordings of the original tapes to the defense (T. 6287). That morning the court again stated that "the transcripts are first draft as a framework for editing after further listening . . . by the attorneys" (T. 6973), "I thought the most important thing was to get something out from which counsel could work, in order to edit it" (T. 6980), ". . . I don't know how we are going to come to an agreement if we use the tapes on what is an authentic transcript. But you have it to work from" (T. 6980-6981). That afternoon, in response to the question, "Are we allowing the examination on the transcript without the admission, is that your ruling?", the court replied, "I am not going to permit the reading of a transcript as evidence until there is something there, but you may ask any question that has a good basis" (T. 7202-7203).

As a result, questions were asked by reading from the transcripts (e.g., T. 7247-7249, 7292-7297), although the court would not allow the rough draft transcripts to be read as evidence or the tapes to be played for the jury without the production of accurate transcripts (see T. 5279, 5344-5345, 5362, 5650, 6973, 6980, 7203, 7351, 7377, 7400, 8199, 8241-8243). The Court's rough draft transcripts are in defendants' Appendix D.

A. The Prosecution Did Not Suborn Perjury Or Lie To The Court

1. The most serious allegation defendants raise is that the prosecution suborned witness Kraft to commit perjury (Perry 36, 45; Gerry 29, 32). The basis for this claim is a discussion which occurred in prosecutor Pollack's office on Friday, April 19, 1974. The discussion, surreptitiously recorded by Pullman, involved

Kraft, Pullman, prosecutor Pollack, F.B.I. Agents Walsh and Fanning, and numerous people wandering in and out as they left for the weekend (we identified 10 different voices). During the discussion the subject of David Kraft's testimony arose. He had testified that afternoon and the thrust of the defense cross-examination was "could the defendant Gerry's operation have involved 'a tout scheme' rather than bribery?" In Pollack's office Kraft insisted "this ain't nobody's tout scheme" (App. D-59), and pointed out, in Pullman's presence, that when Pullman had originally approached him Pullman had predicted the following day's superfecta results (App. D. 66). The conversation continued on this theme for several moments when agent Fanning asked almost rhetorically, "All right, do you think he was touting Richard Perry? and the Vario's? Do you think he was touting the Vario People?" (App. D 70-71). The conversation briefly touched on Vario's notoriety and then switched to interviewing someone in Florida (App. D 71). From this passing question by an F.B.I. agent the defendants conclude that the government was suborning Kraft to commit perjury by interjecting the names of Perry and Vario[12/] into the discussion with Kraft about Gerry's bribery operation.[13/]

12/ At trial the prosecutor, out of the presence of the jury, explained that "you don't tout with individuals who react with friends in the mob. We are prepared to show that through Mr. Cussell, Mr. Perry maintained a key to the apartment of Paul Vario and Peter Vario is the son of Paul Vario and I can produce from the McClellan Committee some evidence that Paul Vario is a lieutenant in the Old Luchese family of the Italian underworld. This is something I steered away from in the direct examination of Mr. Kraft . . ." (T. 4697).

13/ Gerry raises a related claim (Gerry 33) that the government improperly exploited the "mob" testimony at trial. For this proposition Gerry refers to two isolated and obscure references to a "made man" and "bookmaker" in the course of an 11,000 page tran-

Initially we note that defense tapes admittedly do not cover previous interviews in which Kraft was present. Moreover, Kraft testified that he had previously told the F.B.I. about Perry's connection with the Brooklyn mob (T. 4927, 4933, 4938) and the 302 on which the agent described that interview stated that Kraft had been informed by Pullman that a man from "Brooklyn, named Richie", had a "crew" which "could really punch out tickets" (T. 4965). Kraft testified that he had used the word "crew" synonmously with "mob" (T. 4963-4964, 4971).[14/]

From a reading of the April 19 transcript, it is apparent that the government was not suborning perjury, but rather seeking to ferret the truth from Kraft, a reluctant witness who would

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script (his other citations are to discussions occurring out of the presence of the jury). A fair reading of the transcripts reveal no such "exploitation". Similarly, of the 77 pages in defendants' Appendix E, which purports to contain trial references wherein Perry was connected with the Mafia, we could find only the same three references ("fierce mob" E48-E52, son of "made-man" E59-E60 and "bookmaker" E64-E66). All other passages were either out of the presence of the jury, elicited by defense, or there was no apparent reference to organized crime. In addition, the jury was informed at each defense request that the testimony was being admitted only as it related to the state of mind of a witness, for impeachment etc., but not for the truth of the matter asserted (e.g., T. 4926, 4930, 4931, 7828-7829, 8166).

Moreover, Perry's assertion (Perry 26, 39) that a juror, subsequent to trial, informed him that Perry had been convicted because the jury believed him to be an "enforcer for the mob" is not part of the record and is inappropriate for consideration by this Court. If there were any substance to this allegation, it should have been brought to the attention of the trial court, pursuant to F.R. Crim. P. 33. The district court could, if it found the claim colorable, then have called some or all of the jurors, placed them under oath, and allowed both sides to question them regarding this claim. See United States v. Polizzi, 500 F.2d 856, 884 (9th Cir. 1974).

14/ In the course of the defense tapes, witness Rothstein also indicated that he had been told that there was "somebody by the name of Richie, who'll take care of a lotta things" (D. 206).

prefer not to disclose some of the seamy aspects of his past (D. 64). Moreover, the April 19 conversation occurred in the presence of, and under the promptings of Pullman, a "double agent" who, aware that the conversation was being recorded, asked a series of leading and self-serving questions in an attempt to elicit damaging statements.

For instance, in one exchange Pullman alleged that prosecutor Meyerson wanted a witness to identify a defendant whom the witness could not in good faith identify. F.B.I. Agent Walsh responded:

> WALSH: We never asked you to do that, have we?
>
> PULLMAN: [Prosecutor] Meyerson did.
>
> WALSH: Meyerson asked you to?
>
> PULLMAN: He's telling me there's people in the room they weren't there. He told him the same thing.
>
> WALSH: So, you just say no, that's not so. That's all I am telling you.
>
> PULLMAN: Oh, all right.
>
> WALSH: Now, basically, all we are going to have is the truth. In other words, these are made out. Joe [F.B.I. Agent Fanning] wrote this one from the first time he interviewed you, I wrote most of the other ones from the times that I interviewed you. Any time I thought that you --" [D. 27).
>
> (Pullman cut this response short.)

A few moments later, in response to the statement by Pullman that "the truth is easy to remember; the lies are hard" (D. 29), an F.B.I. agent responded with an incredulous "what?", and when Pullman repeated the statement the agent informed him: "If you see anything here [apparently referring to 302's] that we put down that's the least bit out of character, y'know . . .

that's out. In other words, you just get on and say what you know. We are not asking for anything else" (App. D. 30). He then reassured Pullman, ". . . you don't have anything to worry about because you would be telling the truth" (App. D. 35).

Similarly, on the tape of the 19th, the following discussion [apparently out of Kraft's presence) occurred between prosecutor Pollack and F.B.I. Agent Fanning concerning superfecta purchases of February 6:

> "POLLACK: Now that was our vulnerable period all the way along, because he [Kraft] never could detail when he stopped betting through Joe and getting the information directly from Gerry.
>
> FANNING: That's right.
>
> POLLACK: So the sixth doesn't bother me that much. He's still fuzzy on that and we can't put words in his mouth.
>
> FANNING: No.
>
> POLLACK: So we got hurt on that . . ." (App. D. 77)

In sum, the court properly concluded that the government was not attempting to suborn perjury (T. 5352), but was in fact merely attempting to prepare a rather reluctant witness for trial. This conclusion is buttressed by the sheer improbablilty that the prosecution would attempt to suborn perjury from Kraft in the presence of Pullman and other witnesses. When placed in context, it is apparent that Agent Fanning was merely asking a rhetorical question, and one which attracted little attention. As both Kraft and Pollack indicated at trial, this was a passing discussion in hectic circumstances on a Friday evening which did not make a great impression on either (See T. 4887, 4905). The bulk of the preparation of this witness for his re-direct examination occurred the following Sunday and early Monday morning (T. 4887). There is nothing on

the tapes which supports the defendants' claim that the government asked any witness to lie, in fact there are repeated exhortations to tell the truth (App. D. 27, 30, 35, 77; T. 7453).[15/] The defendants have taken a passing remark and jumped to a conclusion that is both unwarranted and unfair to the individuals involved.

2. The defendants also accuse Prosecutor Pollack of lying to the court in reference to his recollection of the Friday discussion which Pullman taped (Gerry 63; Perry 40). On cross-examination, government witness Kraft testified that he had been in Pollack's office, with approximately 10 other people on Friday the 19th. There were discussions going on for approximately 20 to 25 minutes which he could not recount "word for word" but he had not discussed the testimony he was going to give (T. 4874-4877). He stated that he had discussed his forthcoming testimony with Pollack over the weekend, but that the discussion occurred before the trial that morning (April 22) (T. 4877). He later testified that he "didn't recall exactly" whether his prospective testimony was discussed on Friday (T. 4905) but if the prosecutor indicated that they had discussed it at that time, then "I would be in error, sir" (T. 4908).

Mr. Pollack, when questioned at side bar, stated that Kraft's testimony had been discussed on Friday, but that he had not received a satisfactory answer until the following Sunday when he had formally discussed the witness' testimony. He

15/ Although not picked up in the court's rough draft transcript, Agent Fanning at one point in the conversation on the 19th interrupts Kraft who is saying (bottom D.55),"Oh, Mr. Gerry told him . . .
FANNING: So that's all you can ever tell . . . just the truth.

explained:

"MR. POLLACK: My remembrance is the following:

Mr. Kraft is correct, he spent twenty minutes16/ in my office. There were a myriad of people in there, many of which he does not know.

During the course of this, I said, 'Dave, I feel that the tout scheme has been brought up very sincerely and I think we have to answer it. I want to know from you why you did not think this was a tout scheme.'

I never got an answer from the man, simply because people were milling around. I did talk to him yesterday, telephonically, and he gave me the skeletal of what he would say, and we discussed it further this morning between 9:15 and 10:00 o'clock. And that is the best I can remember.

MR. BOBICK: You never spoke to him on Friday night?

MR. POLLACK: I spoke to him on Friday, and requested of him to answer that part of the cross-examination.

MR. BOBICK: You say to this court right now that he never spoke to you Friday night?

MR. POLLACK: We spoke. We did speak, but I don't think he gave me the answer.

The first time I got the answer was yesterday, that I can remember.

MR. BOBICK: You told us this morning that you spoke to him Friday night, and he gave him [sic] a whole list of items, that's what you said this morning, Mike, you said it this morning right before this court.

MR. POLLACK: I will simply state that for me, Friday through Monday is one day. I will make that statement." (T. 4887-4888).

16/ Pullman's recollection of this meeting was that it took approximately a half hour (T. 6902).

Contrary to defendants' assertions (Gerry 63; Perry 40), it is clear that Mr. Pollack did not lie to the court. The tapes in fact corroborate his recollection of the Friday discussion as a rather chaotic meeting in his office in which numerous people were coming and going, including himself, and during which the discussion as to why Kraft did not believe he had been the victim of a tout scheme was left up in the air. Moreover, there is no apparent reason why either Kraft or Pollack would wish to lie on the collateral issue of when they had discussed Kraft's testimony, when both agreed it had occurred over the weekend and the only discrepancy was what day.[17/]

17/ Perry also claims that the government "permitted its witness [Kraft] to lie on the stand"(Perry 40). This claim is not borne out by the record. As indicated above, Pollack gave his recollection of events, which differed from the witness' (see T. 4898). It is not apparent what else the government attorney could do in such a situation where his recollection differs from a witness on the insignificant and collateral issue of whether Pollack and Kraft had discussed Kraft's prospective testimony on Monday or Friday.

B. Statements Made By Government Agents To Prospective Witness Pullman Do Not Warrant Reversal.

1. In the course of the conversations which Pullman secretly recorded, he repeatedly steered the discussion to the possibility that he might end up in prison as a result of a guilty plea (e.g., App. D-30). In response, different government agents attempted to reassure him that he would not go to jail.

18/

WALSH: I give ya my personal word, there's no way you're gonna get screwed or do time.
PULLMAN: There's no way I'm gonna do time?
WALSH: Right; I can guarantee that to ya.
PULLMAN: You can guarantee that -- okay.
WALSH: Off the record.
PULLMAN: Oh off the record, yeah (App. D 33).

* * * *

FANNING: What are ya worried, about, let me hear.
PULLMAN: Well, I'm worried about, we go before the Judge and we're guilty and he's gonna sentence us and we're gonna go to jail. That's what I am concerned about.
FANNING: You're worried about going to jail?
PULLMAN: Uhuh.
FANNING: Okay. I can't say anything about it. I don't think you're going to no fuckin' jail, but I ain't gonna tell ya that.
PULLMAN: Oh, like ya said, it's all off the record, but ya know --
FANNING: Yea, we -- it comes down to the old thing, Joe, we can't make you a promise, but ya know, Pollack's gotta go before the Judge, and the Judge says, "Well, who cooperated with you?" "These gentlemen did." --"Thank you."
PULLMAN: Oh, in other words uh --

18/ For the convenience of this Court, we have supplied the names of the individuals who, we submit, were speaking. In this passage, F.B.I. Agents Walsh and Fanning are talking with Pullman on the 18th of April.

FANNING: He could sentence you to jail.
PULLMAN: Pollack -- Pollack con-controls a little bit of what's going to happen?

(VOICE IN BACKGROUND)

FANNING: You bet your ass he does -- sure.
PULLMAN: Oh, he's --
FANNING: He's going and he's going to make it good for you people.
PULLMAN: Him and that guy are good friends, right? (App. D. 34).
FANNING. Yeah.
PULLMAN: Him and that guy are good friends?
FANNING: Yeah, real good.
PULLMAN: Real good?
WALSH: I'm -- I'm serious. I know that kind of --
PULLMAN: Y'know --
WALSH: I can understand why you would be a little concerned.
PULLMAN: I am in a -- I'm in a bind here and ya know -- Kantor got transaction, everybody got transaction really. We're here, ya know. That ain't right either.
WALSH: Okay, so let me just go back to this. All right, I can spend all day telling you, y'know, you ain't got nothing to worry about, y'know.
PULLMAN: I know, but still ya got to go there. This is got to happen, and I don't know who knows who here. But apparently --
WALSH: Pollack and Judd are close.
PULLMAN: Are close.
WALSH: They both like each other. Y'know, he's gonna tell him, "Hey, these guys, Y'know, did this for us."
PULLMAN: All right. (App. D 35).

On the 19th, the following colloquy occurred:

PULLMAN: Well, with the judge, -- you know you're here and he's there, and you give me absolution, and uh,you know, guy's got cancer. You can't help the guy. It's like throwing holy water on the poor face of the guy who's got cancer. You know.

WALSH: The judge in this case is a judge that when Michael (Pollack) says this guy was cooperative, you know, that's it.
PULLMAN: You still ain't telling me nothing.
WALSH: Well, I'm telling you about as much as I can tell you. In other words, it's like what Joe said yesterday, we can sit here, but we

can't make promises to you. But by the same token, we say that -- you pull the shit that.....

PULLMAN: Well, how can I believe you, if you can't tell me a promise?

WALSH: Because we can't--we can't do that. We can't have you get on the stand and say were any promises made to you.

PULLMAN: Well, how could I say---------- [App. D 115] there's only you and me here. How can I say -- I can't tell 'em what you said to me alone. There's nobody here.

WALSH: If they ask you on the stand, they say "Were any promises made to you?" And the answer is, no, no promises were made to me.

PULLMAN: Oh, oh, that's a promise. Not me, I want to know what's happening. I don't want that holy water on me.

WALSH: I know, but what I'm telling you is you have -- you've got --

PULLMAN: I want something substantial. I want to know something what's happening.

WALSH: I'm tell you, you're be covered. Don't worry about it. It's like telling a two year old kid to cross the street. Don't worry about it, kid, you'll be all right. No cars will hit you.

PULLMAN: Because they'll see you.

WALSH: No, if I control the street, though, if I control the traffic on the street the two year old kid has nothing to worry about.

PULLMAN: Yeah, you control the traffic.

WALSH: Yeah, but I'm saying in this case I control the traffic. (App. D 116)
Yeah.

PULLMAN: In other words, you're saying you control the judge.

WALSH: Yes.

PULLMAN: You control the judge.

WALSH: Yes.

PULLMAN: You or --

WALSH: Michael [Pollack],

PULLMAN: All of you?

WALSH: All of us.

PULLMAN: You all control the judge.

WALSH: Right.

PULLMAN: All right.

WALSH: And, in other words, anything that is done is --

PULLMAN: Well, we'll talk to Michael [Pollack], and see what else he has to say.

WALSH: Okay.

PULLMAN: So he can put my mind at ease on that. As long as you say you control the judge,

it will help me. In other words, he's got him in his hip pocket.

WALSH: In other words, what -- what Michael recommends when Michael goes to him and says this man's been cooperative, I recommend (App D. 117) he receive no sentence, the judge says, "You're right, Michael."

PULLMAN: In other words, whatever Michael says --

WALSH: Yeah.

PULLMAN: -- he controls the judge?

WALSH: Right. It's what they recommend. If they recommend leniency, if they recommend that no sentence will be given,

PULLMAN: They special _____ all together. He's got his own mind.

WALSH: Who?

PULLMAN: The judge.

WALSH: Yeah.

PULLMAN: Why should he -- why should he do what this guy tells him to do?

WALSH: Because the judge has -- realizes that in presenting a case, you can't present a case, you know you can't have people testify against themselves, you know, willing to sacrifice --

PULLMAN: How well does he know this guy? This judge?

WALSH: How well?

PULLMAN: Yeah. (App. D. 118)

WALSH:19/ Well. It's the type of thing when Michael gets on the phone and says, "Judge," and they talk, "Listen -- "

PULLMAN: They have to make a deal before the --

WALSH: Listen, why do you think people aren't in this case? It's because the Judge said to Michael, "Listen, Michael, I really don't want all these. I want this, I want that." Michael says, "Okay, we'll do it your way." By the same token, Michael says to the judge, "Listen I'd like to do this, I'd like to do that," that's the way it's done.

* * * *

19/ The transcript here incorrectly identifies the speaker as prosecutor Myerson, when in fact it was Agent Walsh (T. 6979).

PULLMAN: Well, Seymour [Rothstein] he'd -- he'd understand. See, he tells lies he don't even know he's telling lies about, as far as he goes, Christ. you know, I don't know (inaudible) you say the judge and him are real close and --

WALSH: They are, really. I mean, Joseph, you have nothing to worry about in that regard, and I'm not telling you as an adult telling a two-year old child. I'm telling -- I'm talking from experience, from what I know has gone on in this case. Now, that's the same way --

PULLMAN: I imagine some guys down there ain't like cancer, either.

VOICE: Myerson.

WALSH: What? What?

VOICE: Telephone call, Robert.

VOICE: Telephone. Hi Joe.

WALSH: Tell him how close Michael and Orrin are. We're starting on that again.

PULLMAN: Give me some absolution already, will you? They're throwing holy water on me.

WALSH: Which line?

(Inaudible.) (App. D. 120)

PULLMAN: He's telling me that Michael is real close to this Judd, and I ain't got nothing to worry about and he's got him in his hip pocket like.

FANNING: Please.

PULLMAN: This is between me and I, all right. Whatever you say, you know this is all off the record.

FANNING: In other words, you're worried about the other thing still.

PULLMAN: I -- yeah, IRS you says I don't have to worry about that or nothing. You'd take care of that and there'd be no problem.

FANNING: Well, the only thing you have to worry about with IRS is paying the money that you got.

PULLMAN: Well, what I declare, and what I deduct, that's my problem.

FANNING: Right.

PULLMAN: Yea. You know --

FANNING: Well, if the rest of it is all turned over to Junior, you don't -- shouldn't have to worry about that part of it at all.

PULLMAN: No, like I know you (Inaudible.) you're helping Dave [Kraft] in here an awful lot, you know -- (App. D. 121)

FANNING: 20/ I'll help anybody that helps us, and that's all I can promise anybody. That I'm going to say to you that you're going to walk away from this I'm not going to say that. Do I believe you are? Certainly I do. But I'm not going to tell you I did, but you got to take the witness stand and --

PULLMAN: Yeah.

FANNING: -- swear that I never made a promise --

PULLMAN: Yeah, well --

FANNING: And I'm funny that way. I'm a funny son-of-a-bitch. I want you to go up there--

PULLMAN: I guess you got reason for that, but still, you know, like I said, it's like the guy throwing holy water on they guy that's got cancer. You're cured, don't worry about it. You know, but the guy's still got cancer. (App. D. 122).

* * * *

In addition, Pullman tried to elicit reassurances from prosecutor Pollack on April 21:

PULLMAN: I ain't worried 'bout that, but, uh, they tell me one thing. You're closer to the judge and alla that.

POLLACK: That's true, but in a Federal court, you cannot guaranty, 'cause a judge can turn around. Now this judge has never turned around. When I walk into court at the time of your sentencing, I will say to that judge I have never had a man testify so honestly. This man -- There's no purpose served in this man goin' to jail.

PULLMAN: I don't want that shit. I want, you know -- Don't give me that nonsense in front of the judge and jury and all that. Make it clear, if you and him make it amongst yourself, if you're that close to the guy. I don' wanna --

POLLACK: This judge does not do that. He will not take orders.

PULLMAN: You talk to him. I-If you're as close to him as they say you are, then you can make a deal beforehand. If you can't then you -- (App. D-211).

20/ The transcript incorrectly identifies this speaker as Pollack.

POLLACK: No, I can't.
PULLMAN: (Cont'g) -- aren't close to the judge.
POLLACK: I can't make any deal you want.
(App. D. 212).

* * * *

POLLACK: This, This court will not allow plea bargaining.
PULLMAN: What's "This Court" you're talkin' 'bout?
POLLACK: This Federal court.
ROTHSTEIN: The judge?
POLLACK: No, the whole court.
PULLMAN: Which --
POLLACK: The eleven judges.
PULLMAN: (Cont'g.) -- I don' even know what that means.
POLLACK: That's when the attorney for the Government and the witness, or defendant, agree what you'll get. They settle it. They demand the right to sentence as they see fit. Now, in many cases, in most cases, it's a fiction. It's a fiction which they live with, because what the judge will say at the time of sentencing, if you've been promised anything, only that "my cooperation will be made known to the court". The judge will acknowledge that as not being a promise and realize that that promise is made in this court everyday, is a promise that if the (App. D-213)
(CONT'G) witness testifies truthfully, he will be given a suspended sentence and it happens everyday of the week in this court and I've had it happen forty times in the last year -- You don't know the judge.
PULLMAN: Why do I --
POLLACK: You don't know the judge.
PULLMAN: In other words --
POLLACK: You don't know the judge. You don't know this man. This man does not handle --
PULLMAN: I donno.
POLLACK: He's even-tempered like --
PULLMAN: You've been talkin' to him. I donno.
POLLACK: (Cont'g.) -- me.
PULLMAN: I don't know.
POLLACK: He's even-tempered like this. He doesn't go up or down. He has no hatred. He's a man who doesn't sentence bankrobbers to long sentences, for God's sakes.
PULLMAN: Well, if -- he, you don' sentence bankrobbers, he sentenced KENNY (CONNIE) ROGERS to two years. Why? Because he wanted --

POLLACK: Because he wanted her --
PULLMAN: (Cont'g.) -- a million dollars?
POLLACK: (Cont'g.) -- to testify. Absolutely.
PULLMAN: You told him to sentence Connie Rogers for two years. Anyway, the jail -- anyway, get a stiff sentence you can break it down. Oh, then you talked to the judge prior to the occasion? You had a conversation after the course of the day? (App. D-214).
POLLACK: Absolutely.
PULLMAN: So then you are close to the judge?
POLLACK: I told you I am.
PULLMAN: Yeah, but you never told me that way. Like you referred to him -- See. You tried to put the screws to Connie to testify. Then you made him give her a stiff sentence since, so she would testify, which she didn't so you're close to the judge. You can make deals with him. You just made a deal, you told me, with him.
POLLACK: Yeah, but you're look -- For -- Joe, it's a fiction. The guaranty --
PULLMAN: No. I want your word.
POLLACK: You've got my word.
PULLMAN: (Cont'g.) -- with the judge.
POLLACK: You got my word.
PULLMAN: You made the deal with her.
POLLACK: Yeah.
PULLMAN: You made her get two years. So, at that time, you could be -- You're close enough to this guy to control him, to that extent.
POLLACK: Right.
PULLMAN: So, you're close enough to control him --
POLLACK: He respects only --
PULLMAN: Tell me, THE WALL?
POLLACK: Let's put it this way. He respects --
PULLMAN: He couldn't JERK your word. That might -- (App. D-215)
POLLACK: No.
PULLMAN: He wouldn't give me his word.
POLLACK: No
PULLMAN: I want this straight out. I want it -- you know.
POLLACK: Well, he's gonna ask you --
PULLMAN: When?
POLLACK: At the time, at the time you take your plea, whether or not you were promised anything.
PULLMAN: Well, forget about it. I ain't promised nothin'. What I say to you, you say to me. That's it.
POLLACK: Right.
PULLMAN: What Fanning to me or the other guy, that's it. You, you were close enough to the judge, at that time, to get Connie two years.

POLLACK: Right.
PULLMAN: But you told him to gi-- to give her a harsh sentence and he did giver her a harsh sentence.
POLLACK: And he -- er, tried to give Joe Bonnacoree a harsh sentence, and he was going to give Junior and Turcotte harsh sentences.
PULLMAN: Which you told him to do, prior to that --
POLLACK: Richt.
PULLMAN (Cont'g.) -- and I suppose GROSS --
POLLACK: That's right.
PULLMAN: (Cont'g.) -- but you just called him to make a deal for me, and then I -- So, then, you never, never did that.
POLLACK: That's partly, to some extent. (App. D-216).
PULLMAN: Oh, now. Wait a minute. I'm on my side, not on your's.
POLLACK: No, he's not -- he's not in my hip pocket, Joe.
ROTHSTEIN: Was it, uh, pretty well what he -- what you say he does.
POLLACK: He 'll agree.
PULLMAN: He jumps to the whip, a little?
POLLACK: I'd say forty out of forty times.
PULLMAN: Yeah. In other words, you control him, -that judge.
POLLACK: In this degree, as far as witnesses go. Yes. Yes.
PULLMAN: In other words, what you say, he does?
POLLACK: No. If I told him to give a guy twenty years, he wouldn't do that.
PULLMAN: I mean, you know, without one, - gettin him destroyed; you know, makin' a fool outa him, but you, you know, you can control it. All right. Then we'll try to get the transaction. We'll see what happens.
POLLACK: All right Joe, tell me the background of yourself.

The defendants include all of the trial court's rough transcript in Appendix D, with the exception of a separately paginated 10 page segment which was apparently recorded on April 21 (T. 7038-7040). That segment, which we are including as an addendum to our brief (Addendum 1-10), includes the statement referred to by Perry (Perry 43) wherein Pollack

informs Pullman that the court recommended his admission to the New York bar.

> PULLMAN: And I don't know how close you are to the judge. That's what I'm concerned about. You know, they keep --
> POLLACK: I have never had a man sentenced before this judge, who has testified, who did not get a suspended sentence.
> PULLMAN: That you ask?
> POLLACK: Right.
> PULLMAN: In other words, you talked to this judge prior to this?
> POLLACK: We tell him the man has been cooperative, the basic --
> PULLMAN: What do you mean "we tell him'? You and Dillon?
> POLLACK: I tell him. If Dillon -- Dillon has come up on occasion, but -- where to the Government. I, I spoke to him for the Government.
> PULLMAN: In other words, you and the judge are good friends.
> POLLACK: The judge and I have tried many cases together -- He's written my letter of recommendation for admission to the New York bar.
> * * * * (Gov. Add. 3-4).
> PULLMAN: Yeah, but still, I didn't know -- I don't know. You, you, - the first thing you tell me you and the judge is close.
> POLLACK: We are --
> POLLACK: I stated this judge has never sentenced a man that I've recommended against sentencing, but there's a first time for everything.
> PULLMAN: Yeah, and I don't need that bullshit.
> POLLACK: I know you --
> PULLMAN: What do I need it?
> POLLACK: Well, I can't make a guaranty to you, if that's what you're lookin' for?
> PULLMAN: Yes, sure, I'm lookin' for a guranty.
> POLLACK: Can't do it. Joe, I can tell you that there's no way you're goin' to get -- (Gov. Add. 4-5).

2. In order to fairly evaluate defendants' claim that recorded statements of the prosecution, such as the above, warrant reversal and dismissal of the indictments /(Perry 42; Gerry 63) it is necessary to consider the setting

in which the recorded conversations occurred. These conversations of the 18th, 19th and 21st occurred while the government was attempting to prepare rather recalcitrant witnesses for trial by refreshing their recollection with their previous statements before the grand jury and to F.B.I. agents. During this preparation the government was faced with the situation of having had two of its major witnesses become fugitives (Proman and Sherman) and a third (Pullman) begin making statements indicating a "lapse of memory", apparently triggered by his desire for immunity (T. 7343).

In reading the transcripts it is apparent that Pullman had in fact become a defense agent. He asks a series of leading questions designed to elicit damaging responses from the FBI agents and prosecutors. Knowing that the conversation is being recorded, he persistently returns to the question of whether he will go to jail with such provocative questions as "In other words, he's [Pollack] got him (the judge) in his hip pocket." (D. 117), and "He jumps to the whip, a little?" (D. 217).

Despite Pullman's efforts to get them off the track, the prosecution team repeatedly returns to the task of advising and inducing Pullman, a reluctant witness, to testify truthfully. Moreover, prosecutor Pollack clearly informs Pullman that he does not have the judge "in his hip pocket" (App. D. 217) and that, even though Pollack will recommend a suspended sentence for Pullman, he cannot gurantee that the judge will impose a suspended sentence (Gov. Add. 5).

Any passing ill-advised remarks[21] to Pullman by the prosecution team were made in an extra judicial setting and did not prejudice the defendants; to the contrary, these isolated remarks redounded to their benefit when they were fully exploited by defense counsel on cross-examination.[22] Accordingly, dismissal of the indictment, as advocated by defendants, is entirely inappropriate. See United States v. Abbott Laboratories, ____ F. 2d ____, (4th Cir. No. 74-1230, decided June 4, 1974). Cf. Barker v. Wingo, 407 U.S. 514, 522 (1972).

21/ The statement in Gerry's brief (P. 66) that "He's going to give me just enough to what he thinks will get me a conviction." is misleading. The prosecutor was not referring to the court, as defendant implies, but to David Kraft. The prosecutor was describing Kraft's reticence in revealing his past.."He'll sit there, and you can see him thinking up how to avoid answering a question. He must have waited forty-five seconds with his eyes rolled to the back of his head before he answered whether he had been to Liberty Bell within the past three weeks. He was not -- he lied on the stand. He'd been there. He saw _____. He was not going to answer it. And that hurts. The same way his arranging a fix for Carmine Abbatiello should be brought out. The Judge has specifically ruled I can get prior similar acts in. He won't give it to me. He's going to give me just enough to what he thinks will get me a conviction. And that's what's hurting us. Because by trying to hide stuff, he's afraid to speak extemporaneously" (App. D.90-91). Thus, when the statement is properly juxtaposed it is apparent the prosecutor was again referring to Kraft.

22/ We note that the defense made no unequivocal request for a full hearing on the alleged prosecutorial misconduct. The passages cited by defendants (Perry 25) reveal that the defense asked for a hearing to question Pullman and listen to the tapes, which they received (T. 5284, 5285, 5341-5342). Although Pullman could not be located that day, he subsequently testified fully. When counsel for Gerry indicated he intended to call the agents and the prosecutors, the court indicated its acquiescence (T. 5653). In addition, Pollack volunteered "to take the witness stand (T. 4887). Later when a co-defendant's attorney stated "we ought to have a voir dire on Agents and the Prosecutors", counsel for Gerry apparently rejected that suggestion (T. 5363).

C. Rulings And Instructions By The Court Relative To The Taped Conversations Were Proper.

1. It is settled law that the trial court has the discretion to exclude even relevant evidence if its probative value is outweighed by the time its presentation would require, or the confusion it would engender. See United States v. Ravich, 421 F.2d 1196, 1204 (2nd Cir., 1970), McCormick on Evidence, §185 at pp. 438-440 (Cleary Ed., 1972). Here, the Court acted well within its discretion in requesting accurate transcripts as a prerequisite to allowing the defense to play the tape recordings to the jury. See United States v. McKeever, 271 F.2d 669, 675-676 (2nd Cir., 1959).

On April 24, when the tapes were played in the presence of the court and Counsel, the court noted, "I haven't been able to understand much of this" (T. 5344). Shortly thereafter, the court stated, "Generally, when I've heard tapes, I've had the benefit of a transcript, which purports to say whose voice is on the tapes . . ." (T. 5344-5345), and counsel for Gerry replied, "I haven't had time, your Honor" (T. 5345). The tape recordings are in part unintelligible. There are often several people speaking at once, loud background noises (including cars, horns, other conversations, radio playing, and a loud rustling noise apparently made when Mr. Pullman moved), inaudible sections, and sudden gaps in the tape with no sound. As a result, the conversations are frequently difficult to follow, even with a transcript, and impossible without. (e.g. T. 5279, 5344-5345, 6980; App. D. 2, 3, 8, 11, 14, 17, 21-24, 123).

Of course the fact that portions of a tape recording are inaudible or unintelligible does not in itself require the exclusion of the tape recording. See United States v. Bryant, 480 F. 2d 785, 790 (2nd Cir., 1973). This is not to say, however, that the trial court may not consider the quality of the recordings in determining whether to admit the recordings into evidence without any transcript having been provided by the moving party to aid the jury in understanding the recorded conversation and in identifying the voices on the recordings. Between April 24, when the court first indicated the need for transcripts (T. 5362), and the completion of trial on June 1, the court repeatedly informed the defense that the tapes were difficult to understand and if they expected to play them for the jury they would have to provide authenticated transcripts (T. 5279, 5344-5345, 5362, 5650, 7351, 7377). This the defense failed to do.

Additionally, the court took the time and trouble to prepare and provide defense counsel with rough draft transcripts of the recordings. It was not unreasonable, therefore, for the court to ask defense counsel to assist the court by editing and correcting the court's draft transcripts.

Moreover, here, as in United States v. McKeever, supra, 271 F.2d 669, 676 (2nd Cir., 1970), the jury had before it the fact of the recorded conversation, a description by Pullman of the contents of the conversations, and, at times, the very words of the conversations through use by defense counsel of the court's transcript during cross-examination of witnesses.

In such circumstances, it cannot be said that the court abused its discretion in requesting accurate transcripts before allowing the defense to play before the jury lengthy and frequently difficult to understand tape recordings dealing with a collateral issue.[23/] C.f. United States v. Bowe, 360 F.2d 1, 15 (2nd Cir. 1966),certiorari denied, 385 U.S. 961.

2. Although the defense had the tape recordings during their cross-examination of Kraft, they chose, apparently for tactical reasons, not to use them at that time. Instead, after Kraft had completed his testimony, the defendants revealed the existence of the tapes and indicated that they wished to have Kraft recalled during the government's case. The court properly refused to allow the defendants to disrupt the government's presentation, but stated that they could, of course, call Kraft during their case (T. 8248). This the defense chose not to do.

23/ In these circumstances, it was unnecessary for the trial court to reach the issue of whether the recordings themselves were properly authenticated under the standards prescribed in United States v. McKeever, 169 F. Supp. 426, 430 (S.D. N.Y., 1958), reversed on other grounds, 271 F.2d 669 (2nd Cir., 1970). See also, United States v. Knohl, 379 F.2d F.2d 427, 440 (2nd Cir., 1967), certiorari denied, 389 U.S. 973 (1967).

Under such circumstances, Gerry cannot now be heard to complain (Gerry 34, 57) that he was prejudiced by the court's refusal to allow Kraft to be recalled for cross-examination. As this Court stated in United States ex rel Nelson v. Follette, 430 F.2d 1055, 1059 (2nd Cir. 1970), certiorari denied, 401 U.S. 917 (1971) (where the district court had refused to allow a defense witness to be called during the government's case):

> The point is frivolous. A trial judge exercises broad discretion in controlling the conduct of trial and the presentation of evidence. Appellant made no attempt to recall this witness, and it would appear that he voluntarily chose to abandon his testimony.

3. During their cross-examination of Pullman, the defense made the decision to bring out and accentuate some of the extra judicial remarks which Pullman and various government agents made in regard to the prosecutor's relationship to the court and the latter's role in selecting potential defendants (T. 6984-6986, 7096-7099, 7304-7313). This decision was apparently made in the belief that the government and its witnesses would be discredited by these revelations and the defense case thus improved. In this posture, Perry now claims (Perry 45) that the court should have sua sponte declared a mistrial since its "integrity had been placed in issue."

The decision by the defendants to inject these extra judicial comments into the record, in order to attack the credibility of the government and its witnesses, was a tactical one which, as discussed supra p. 35,undoubtedly redounded to their benefit. They cannot now claim to have been prejudiced by their own tactical decision.[24/] This is especially so in view of the court's instruction, which made plain to the jury that the statements were false (T. 7101), and in view of the defense position that they did not want a mistrial (T. 5283), and the defense concession that any allegations about the trial court's integrity are without foundation (Gerry 67).

4. After the tape recordings had been revealed to the jury, defense counsel during government redirect examination of Pullman requested an instruction ". . . that there is nothing illegal or wrong or criminal by Mr. Pullman following Mr. Bobick's advice (trial counsel for Gerry), and wearing a - his own tape recorder." To this the court responded "I am not sure about that" (T. 7260) and then amplified, "Well, by saying I am not sure, doesn't mean it's wrong. It means I am not sure it is right" (T. 7261). The jury was then excused for the night.

24/ The cases upon which the defendant relies are inapposite (Perry 46). They stand generally for the proposition that it is error, sometimes of reversible magnitude, for a prosecutor to inject his credibility into a case in order to bolster his presentation. This is a proposition with which we have no quarrel. However, from this it hardly follows, as defendant argues, that any sort of aspersons cast on the court warrant reversal. This is especially so where the defense is responsible for bringing this issue to the jury's attention.

The following morning the court instructed the jury:

> Now, last night there was a question raised by one of counsel as to the correctness of the taking of the tapes that are involved here. There is no law that prevents a person with his own consent making a tape of anything that he wants.
>
> Whether it is proper for one lawyer to place a tape on somebody whom he knows is going to be in conference with the other lawyer is a matter which has no relationship to the guilt or innocence of Mr. Gerry or any of the defendants in this case and involves issues which have nothing to do with the case. And so I am permitting questions based on the transcript of the tapes. [T. 7277]

Defense counsel requested an instruction on this issue and made no objection to the instruction as given. Moreover, the Court correctly informed the jury of the law. See "Your Professional Ethics" Opinion #328, 46 N.Y. State Bar Journal 303, and articles there cited.

III

VARIOUS EVIDENTIARY RULINGS OF THE COURT WERE PROPER

A. Evidence That Gerry Wagered Large Quantities Of Money In Consistent Betting Patterns During The Conspiracy Was Properly Admitted Into Evidence.

The government, via charts and testimony, proved that during the three month period of the conspiracy charged, Gerry, both directly and through others, was responsible for placing over $1,000,000 in superfecta bets for which he won over $2,000,000. The government's evidence revealed that these bets followed certain patterns (See supra p. 3). On cross examination, the defense attempted to show that these patterns were not inconsistent with a handicapping scheme (E.g. T. 877-880). From this, Gerry argues (Br. 28)

that the "evidence was not probative of a bribery scheme" and should have thus been excluded.

However, there is no requirement that for an item of evidence to be admissible, it must be dispositive of the issue of a defendant's guilt. See North American Phillips Corp. v. Church, 375 F.2d 93, 97 (2nd Cir., 1967). Here the evidence that Gerry was responsible for betting over one million dollars in some two months in consistent patterns, wherein certain drivers were excluded and others included, was clearly relevent to the issue of whether he was involved in a bribery scheme. It tended to show that the defendants were making large bets which were consistent with the scheme alleged in the indictment. Petitioner's argument that these betting patterns were not inconsistent with a handicapping scheme goes to the weight of the evidence, not its admissibility. See §§ 12, 29 of Wigmore on Evidence. (3rd Ed. 1940).

B. The Witness Cussell Was Competent To Testify

On the morning of April 8, one of the defense counsel stated that he would like to have a hearing on Cussell's competency prior to his testimony (which began one week later). The court replied that he would consider the request and the prosecutor volunterred that he had received a letter that morning indicating the witness was competent to testify (T. 2407-2408). That afternoon counsel for Perry stated:

> I would like to ask your Honor when I could have a psychiatrist here tomorrow in connection with the voir dire examination as to the competence and sanity of a witness by the name of Bruce Cussell. (T. 2600)

The Court, apparently acquiescing to the defense request for a hearing, responded: "Have him here at two o'clock." (T. 2600). The next morning

the government supplied the defense with a copy of government exhibit 413, the letter of April 5, 1974 from a Dr. Parlade (T. 2607-2608). In this letter Dr. Parlade indicated that Cussell had no memory impairment and that his "mental condition would not in any way effect his testimony " (Gov. Exhibit 413).[25/]

Perry did not supply the psychiatrist referred to, nor indeed was the question of such a hearing again broached. Rather, on April 15 Cussell testified on direct examination without objection (T. 3567). After cross examination had progressed for some time, one of defense counsel asked that Cussell be disqualified "on the grounds of mental incompetence" (T. 3765), and the following colloquy ensued:

> THE COURT: ... he is corroborated on a good part of his testimony by the agents who said that he was buying tickets . . . I don't think I should strike it out. It is a question for the jury.
>
> * * * *
>
> MR. ROSEMAN: You have observed him and his answers. That is why this application is being made. We are human.
>
> * * * *
>
> THE COURT: That all goes to credibility. I am not going to disqualify him. I have dealt with all kinds of people in mental hospitals. I have questions involving when they are sane and when they are not. I am not going to adjudicate insanity. (T. 3766-3767)

The dialogue on this issue ended with the court apparently agreeing with the government's position that Cussell was competent to testify.

> MR. POLLACK: Based on the evidence that the Court has before it, he is mentally competent.

25/ In government exhibit 414, a subsequent letter from Dr. Parlade, dated April 8, these conclusions were reaffirmed and expanded.

THE COURT: It is a question of credibility for the jury.

Motion denied. (T. 3768)

The following morning the court reiterated that the witness was competent to testify and that the defense objections went to his credibility rather than his competency.

> I think the attack on mental competence was pretty well wiped out by the subsequent defense counsel who cross examined and got quite comprehensible and intelligent, whether credible or not, answers to their questions on cross-examination. (T. 4029-4030).

In view of this record it is difficult to understand defendant Perry's claim that the court erred in failing to hold a competency hearing (Perry 32). The court agreed to allow the defense to present psychiatric testimony on the issue, but they declined to do so. Thus, the only medical opinion offered was that the witness was competent to testify. In view of this, the defense's failure to produce psychiatric testimony when invited (T. 2600), and the court's opinion (from observing the witness) that his testimony was "comprehensible and intelligent" (T. 4030) and corroborated by independent evidence (T. 3766-3767), it is clear that the court did not abuse its discretion in concluding that the witness was competent to testify.[26/] See United States v. Hardin 443 F.2d 735 (D.C. Cir., 1970); United States v. Tannuzzo, 174 F.2d 177, 181 (2nd Cir., 1949), certiorari denied, 338 U.S. 815.

26/ Perry's assertion that "the court was of the opinion that it was up to the jury to determine the question of Cussell's competency" (Perry 33) is inaccurate. Although the court did not explicitly state "I have determined that Cussell is competent to testify", that is the obvious import of his statements (T. 3766-3768, 4030). Having thus determined that the witness was competent to testify, he correctly informed defense that the inconsistencies in Cussell's testimony as well

C. Prior Grand Jury Testimony And Inconsistent Statements Of Recanting Witnesses, And Evidence That Fear Had Affected The Testimony Of One Recanting Witness, were Properly Admitted.

1. Defendant Gerry, while acknowledging the rule in this circuit that prior grand jury testimony is admissible as substantive evidence (Gerry 43), urges this Court to reverse that line of precedent on the strength of Rule 801(d)1 of the proposed Federal Rules of Evidence. However, proposed Rule 801(d)1 adopts the Second Circuit position. See Advisory Committee's Note to Rule 801, which approvingly cites Judge Hand's opinion in De Carlo v. United States, 6 F.2d 364 (2nd Cir., 1925). The proposed rule does not require, as Gerry claims, that the previous statement have been made at a proceeding where cross-examination was available; rather it requires that the prior statement be given under oath at a "trial, hearing or other proceeding" and that the declarant be subject to cross examination at the trial. Rule 801(d) of the Proposed Federal Rules of Evidence, H.R. 5463.[27/] These requirements were plainly met in the instant case.

26/ (Con't) as his mental problems were issues which the jury could consider in evaluating his credibility (T. 3767-3768).

27/ Rule 801(d)1 reads (in pertinent part):

(d) Statements which are not hearsay. -- A statement is not hearsay if --

(1) Prior statement by witness.-- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabribation or improper influence or motive, or

2nd Session, 93rd Congress, H.R. 5463.

2. The defendants, relying on United States v. Cunningham, 446 F.2d 194, 197 (2nd Cir., 1971), certiorari denied, 404 U.S. 950, contend that the trial evolved into a "swearing contest" when the government was allowed to impeach three of its own witnesses with statements they had previously made to government agents (Gerry 44; Perry 60). In Cunningham this Court held that where the witness does not give injurious testimony, but only fails to remember, the government cannot call another witness to testify as to what the first witness allegedly told him. This, of course, is just a facet of the more general rule that a party cannot contradict on a collateral issue by extrinsic evidence. See McCormick on Evidence, §36 (Cleary Ed. 1972). However, where, as here, the witness recants and gives injurious testimony,[28/] the party calling that witness can impeach via extrinsic evidence. See United States v. Burket, 480 F.2d 568, 572 (2nd Cir., 1973),[29/] where this Court approved the procedure followed in the instant case.

3. In the course of the defense case the witness Rothstein was called. He testified that both his grand jury testimony and his testimony during the government's case-in-chief had been largely false, the result of government threats of jail (T. 8299-8301). On cross-examination he denied having expressed fear for his safety (T. 8375). He did acknowledge, however, that he had received payments under the

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28/ For instance, the witness Pullman did not merely indicate that he did not recall his prior statments, he emphatically denied making them (T. 6479) and accused the government attorneys of perjury (T. 6736) and suborning perjury (T. 6509).

29/ In Burket, two witnesses who denied making prior statements were confronted with their F.B.I. 302 statements, and were then impeached by the F.B.I. agents who testified that the witnesses had made the contradictory statements.

witness relocation program although he professed to be unaware of the reasons for his relocation (T. 8388-8389). In this context, the government confronted the witness with a Department of Justice memorandum which stated (T. 8395):

> Pursuant to my conversation with Hopeburn (ph) on February 3, 1974, please terminate subsistence for Seymour Rothstein at once. This request is made because the witness has left his area of relocation and returned to his home, and can no longer be considered secure.

The witness acknowledged having been shown the document (T. 8395).

Defendant Gerry's contention that this "fatally infected the fairness of the proceedings" is without merit (Gerry 40). His reliance on United States v. Franzese, 392 F.2d 954, 960 (2nd Cir., 1968), vacated on other grounds, 394 U.S. 310, and United States v. Scandifia, 390 F.2d 244, 250 (2nd Cir., 1968 , vacated on other grounds, 394 U.S. 310, is misplaced. In those cases, this Court did not hold, as Gerry implies, that a prerequisite to showing that fear had affected a witness' testimony was that the defendant was responsible for such fear. Rather, they stand for the proposition that a party may attempt to explain inconsistencies in a witness' statements by relating whatever circumstances would naturally tend to explain them, and fear is one such circumstance. The defense argument that the government failed to conclusively demonstrate that one of the defendants was responsible for the fear goes to the weight, not admissibility, of the evidence.

D. Evidence Of Prior Similar Acts And Gerry's Suspension From Harness Racing Were Properly Admitted.

a. Prior similar acts.

It is well settled that evidence of prior criminal behavior by a defendant is admissible where it is relevant for some purpose other

than to show that the defendant was a man of bad character and therefore likely to have commited the crime with which he is presently charged. United States v. Deaton, 381 F.2d 114, 117 (2nd Cir., 1967) and cases there cited. See also United States v. Keilly, 445 F.2d 1285, 1288 (2nd Cir., 1971), certiorari denied, 406 U.S. 962. In the instant case a frequent theme in the defense cross-examination was that generally it would be impossible for just one or two drivers to fix a race (e.g., T. 4067-4068). In response to this the government indicated at side bar (T. 5221) that it intended to adduce the testimony of several gamblers who would testify that they had in the past fixed races with two of the defendant drivers in this case (T. 5385-5389, 5867-5881). The court agreed (T. 5258-5260) but indicated that it would accept nothing which occurred prior to 10 years before the indictment (T. 5866-5883). Subsequently, the government adduced testimony that two drivers in 1965 agreed to fix races.

The court did not abuse its discretion by thus allowing into evidence the testimony that two of the drivers had some eight years before agreed to fix races. Where the issue is the possibility of a course of conduct, as opposed to the character of a witness or defendant, the length of time intervening between the prior conduct and the trial is irrelevant.[30/]

30/ Even had evidence of the 1965 races been offered for impeachment purposes, the court's ten year cut off would have been appropriate. See Proposed Federal Rules of Evidence, #609, H.R. 5463. Moreover, since the two defendant drivers who were alleged to have previously fixed races were acquitted, it is illogical to contend that this evidence prejudiced Gerry and Perry, who were not connected with the previous scheme, and indeed were not even drivers.

b. Gerry's suspension from harness racing.

The thrust of Gerry's defense was that he had not won the huge amounts of money involved by bribing drivers, but rather he had won because he was "one of the greatest handicappers in the world" (T. 9429). In response to this theme the government advised the court of its intent to adduce testimomy that Gerry was constantly in debt (T. 8729). Although the court would not allow the government to go into specific incidents (T. 8729-8739), it admitted evidence of one of Gerry's suspensions from harness racing for lack of financial responsibility (T. 8733, 8737). The court properly found such evidence relevant to the issue of whether the defendant was, in fact, an excellent handicapper as the defense was attemtping to show. Moreover, the fact that the suspension had occurred several years before the alleged scheme was consistent with the government's contention that before this bribery scheme unfolded Gerry was not particularly affluent, as would be expected of "one of the world's greatest handicappers."

E. Statements Of Gerry And Co-defendant Sherman Were Properly Admitted.

a. Gerry's statements.

Defendant Perry, relying upon Bruton v. United States, 391 U.S. 123, contends that by allowing an F.B.I. agent to testify as to statements made after the conspiracy by Gerry during a conversation with Kraft (supra, p. 6), the court violated his right of confrontation (Perry 67). It has been repeatedly held that a co-defendant's confession is admissible in a joint trial if references to the other defendants are deleted and the confession as recited does not inculpate the co-defendant. The statements introduced here were well

within those limits; indeed, there was no reference to Perry at all (see T. 1752-1757) and the court instructed the jury that it was admissible only against Gerry (T. 1752-1753). E.g., United States v. Trudo, 449 F.2d 649, 651-653 (2nd Cir., 1971), certiorari denied, 405 U.S. 926. Nor would the termination of the conspiracy preclude Gerry's subsequent statements from being admissible to prove the existence of the conspiracy and Gerry's participation therein. See Anderson v. United States, __U.S.__, #73-346 (decided June 3, 1974), slip op. p. 9.

b. Sherman's statements.

At the end of the government's case, the missing witness Proman was located in California and brought back to testify. Because he recanted the bulk of his previous grand jury testimony, the government offered the grand jury testimony as substantive evidence (T. 7788-7969). Proman, a trainer, testified in his grand jury appearance that the fugitive co-defendant and alleged co-conspirator Sherman had offerred him $1000 if he could persuade the driver Cantor to agree to finish out of the top four in an upcoming superfecta race (T. 7806-7807, 7811). Proman relayed the offer to Cantor who accepted (T. 7813) and Sherman then gave him the $1000 (T. 7811-7812). Proman also stated in his grand jury testimony that Sherman had informed him that the money he was giving him to fix races was coming from defendant Gerry (T. 7839).

The rule is well established that declarations of a co-conspirator are admissible against a defendant who was not present when they were made, so long as there is independent evidence that there was a conspiracy and that the defendant was involved. E.g., Glasser v. United States, 315 U.S. 60, 74 (1942). Thus the statement

made by Sherman to Proman, which incriminated Gerry, was admissible since there was clearly sufficient independent evidence of a conspiracy in which Gerry was involved.

Gerry, contends (Gerry 50) that the independent evidence must also establish that the declarant was involved in the conspiracy as well as the defendant. Assuming arguendo the validity of this contention, independent evidence did in fact connect Sherman with the conspiracy. The witness Cussell testified that frequently after Perry received Gerry's call informing him of which horses to bet, the former would call Sherman and pass the combinations on to him (T. 3585-3586). Two different witnesses testified that they had seen Perry in Sherman's motel room (T. 4985, 7796). There was testimony that calls were made from Sherman's motel room to both Proman's and Perry's phones (T. 6114-6129). In addition, Proman's grand jury testimony[31/] revealed that Sherman, during the course of the conspiracy, had given Proman $1000 to divide with Cantor for

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31/ Gerry, in his summary of the independent evidence, ignores much of the above, apparently under the misapprehension that none of Proman's grand jury testimony can be considered independent evidence for the purpose of determining whether Sherman was involved in the conspiracy. To the contrary, Proman's testimony describing Sherman's behavior (such as the $1000 payment to Proman) must be distinguished from Proman's testimony describing Sherman's statements. The former, as acts, are subject to different standards of admissibility than the latter. United States v. Geaney, 417 F.2d 1116, 1120, ftnt. 3 (2nd Cir., 1969), certiorari denied, 397 U.S. 1028. Unlike statements of co-conspirators, acts are not generally subject to the obstacle of the hearsay rule and are admissible so long as probative of some relevant issue. Thus the acts of others may be admitted as independent evidence to show the existence of the conspiracy as well as its membership. See United States v. Costello, 352 F.2d 848, 954 (2nd Cir., 1965), reversed on other grounds, 390 U.S. 39. See also, Lutwak v. United States, 344 U.S. 604 (1953).

finishing out of the top four (T. 7839-7840). Moreover, Cantor corroborated this version of events when he testified that Proman had indeed approached him and offered to split $1000 if he finished out of the top four in the Superfecta (156-157). When Cantor's horse finished last, Proman gave him $500 several days later (T. 157).

F. The Government Properly Cross Examined Harness Racing Officials And Properly Adduced Testimony From A Statistics Expert On A Simplified Form Of Handicapping.

a. Cross-examination of racing officials.

The defense presented several witnesses who testified that the harness racing industry in New York enjoyed a sound reputation free of corruption, and that the sport was closely supervised (T. 8718, 8467, 8642-8663). After one of these witnesses, a presiding judge of the racing commission, had testified that the races which were the subject of the instant prosecution had been free of any violations, the government on cross examination established through him that there were three times as many racing infractions recorded in 1974 than in 1973 (T. 8705, 8717). When the defense objected to this cross-examination, the trial court pointed out that because they had sought to establish the reputation of the racing industry, the industry was, in a manner of speaking "on trial" (T. 8708).

This cross-examination was completely proper, for by close analogy, it is well established that when a defendant seeks to place his character in issue, the prosecution in rebuttal may challenge his characterization, in part by inquiry into relevant specific instances of conduct. See Rule 404 and 405(a) of the Proposed Federal Rules Of Evidence, H.R. 5463. That a greater number of infractions occurred in 1974 than in 1973, the period of the conspiracy charged, is irrelevant, for the testimony was elicited to contravene the

impeccable general reputation imputed by the defendants to the racing industry.

b. Testimony by a statistics expert.

In order to disprove the defendants' contention that their wagering success was due solely to legitimate handicapping skills, the government presented one Arthur Yaspan, a statistics expert. At the government's request Yaspan had compiled statistics on the 257 racing nights in 1972, when eight horses had run in the superfecta races. He testified that if a bettor had in each of these races discounted the two horses with the longest odds and then wagered all remaining superfecta combinations, a total loss of 20% would have been incurred, $277,000 having been theoretically bet and $221,000 returned (T. 6166-6168). With this example of unsuccessful handicapping, the government hoped to cast doubt on the defense argument that their success was due to pure handicapping skills.

The judge cautioned the jury with respect to this testimony that the defense was not based "just on the horses with the longest odds, but on special knowledge which represented handicapping skill." (T. 6171). During cross-examination, this qualification was expanded. Yaspan acknowledged that his statistical compilation did not take into account the post position of the horses involved or the reputation of the drivers involved in a particular race (T. 6185-6186). It was also shown that the two horses in a race with the longest odds could not always be precisely determined because the superfecta betting windows closed at 6:45 p.m., well before the superfecta races were scheduled at the end of each night's racing program.

(The final odds are, of course, determined just prior to the commencement of a race) (Tr. 6200, 6178-6180).

In spite of the judge's cautionary instruction and the thorough cross-examination of Mr. Yaspan, it is now argued that the admission of his testimony improperly permitted the defendant's guilt "... to be predicated on probabilities, possibilities, or the question of chance." (Perry p. 66). It is true that the presentation to juries of mathematical formulas seeking to establish that it is statistically probable that a defendant is guilty have been criticized. See People v. Collins, 68 Cal. 2d 319, 438, P.2d 33, 66 Cal. Rptr. 497; Tribe, Trial by Mathematics, 84 Harv. L. Rev. 1329 (1971), McCormick on Evidence, §204 at 491 (Cleary Ed., 1972). In the instant case, however, the government's statistical evidence was not introduced or utilized to establish that mathematical probabilities suggested the defendant's guilt. Rather, in response to the defense that Gerry has successfully wagered through his handicapping skills, the government's evidence merely demonstrated - from unchallenged statistics of past races- one form of legitimate handicapping and wagering which would not have produced a profit. As discussed above, it was made abundantly clear to the jury that the particular system hypothesized by Mr. Yaspan did not take into account all factors which another system might consider. Challenges to this particular evidence, then, are properly addressed not to admissibility, but to the weight of the evidence, and the judge's cautionary instruction aptly placed the statistics and compilations in their proper context.

IV. THE PROSECUTOR'S SUMMATION AND COURT'S CHARGE WERE PROPER.

A. The Prosecutor's Summation. The comments in closing argument about which defendant Gerry now complains (Gerry, p. 56)[32] involved speculation as to who would benefit by the witness Proman's disappearance (T. 9942), and whether Gerry was responsible for Proman's support during the period of his disappearance (T. 9949-9950). In fact, the government could properly ask the jury to draw these inferences. Proman's disavowal at trial of his previous grand jury testimony clearly accrued to Gerry's advantage. Moreover, since Proman had no apparent means of support while in California (T. 8059), had informed an FBI agent that he was told to "take a vacation" (T. 8150), and when arrested had a slip of paper on his person with "Forrest" and Gerry's phone number on it (T. 7906-7907), the inferences the government was suggesting to the jury were not without support in the record.[33]

32/ Contrary to the assertion in Gerry's brief (Gerry 56), we could locate no objection to these remarks in the trial transcript.

33/ Gerry also contends that the government erred in asking the following question of Proman:

> " . . . did you ever tell anybody that you were receiving funds while in California from both Michael Sherman and Forrest Gerry, Jr.?" (Gerry 48).

The government properly examined this hostile witness as to how he was supporting himself during this period of time

As this Court stated in United States v. Dibrizzi, 393 F. 2d 642, 646 (2nd Cir., 1968):

> What appellant characterizes as misstatements of fact are really inferences drawn by the prosecutor from the evidence adduced at trial, albeit inferences differing from those which defense counsel would have drawn from the same evidence. Within broad limits, counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence. United States v. De Fillo, 257 F. 2d 835, 840 (2nd Cir., 1958), certiorari denied, 359 U.S. 915, 79 S.Ct. 591, 3 L. Ed. 2nd 577 (1959); United States v. Nunan, 236 F. 2d 576, 588-589 (2nd Cir., 1956), certiorari denied, 353 U.S. 912, 77 S.Ct. 661, 1 L. Ed. 2nd 665 (1957).

Gerry places undue emphasis on the impact of several passing statements in a lengthy and reasoned summation (T. 9737-9957). This is especially so in view of the fact that the court instructed the jury that summation of counsel was "not to be taken in place of your own recollection of the facts or the evidence in this case." (T. 9981). See, e.g., United States v. Briggs, 457 F. 2d 908, 912 (2nd Cir., 1972), certiorari denied, 409 U.S. 986.

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since he was unemployed, had few assets, had stopped receiving unemployment compensation while he was living under an assumed name (T. 8058-8069), and had Gerry's name and phone number on his person when arrested (T. 7906-7907). Although the form of the question was incorrect, in view of the lack of objection by defense counsel this objection was waived. See, e.g., United States v. Del Llano, 354 F.2d 844, 847 (2nd Cir., en banc, 1965).

B. The Court's charge. The defendants raise a number of claims involving the court's instructions (Perry, 50; Gerry, 57). Defendant Perry initially complains that the charge read "as if it were a continuation of the government's summation." (Perry, 50). Specifically, he complains that the court and the prosecution both used the term "mosaic" to describe the government's case (Perry, 51). However, the fact that the government and the court used similar language is, of course, irrelevant so long as the summation and charge are, as here, accurate statements of the law and facts.

In addition, the defendants claim that the court usurped the jury's province by deciding various issues of fact. For instance, the defendant Gerry claims the court's instructions assumed his guilt (Gerry, 59). In fact, the court stated (T. 10,003; App., F. 55):

> When you analyze the evidence, I think you should first consider whether Forrest Gerry, Jr., is guilty or not guilty, because he is the one who is charged with having given the bribes and having furnished the information about the horses and drivers and who should be left out in particular races or keyed in particular races.
>
> If Mr. Gerry is not guilty, I do not believe you can find anyone else guilty in the case. But Mr. Gerry may be found guilty, even if no other defendant is guilty.

Similarly, the defendants argue that the court should not have stated (Tr. 10,000; App., F. 24):

> While, as I have said, it is not necessary to prove the success of a conspiracy in order to establish guilt, proof of the accomplishment of the objects of the conspiracy may be persuasive evidence of the existence of the conspiracy. And you may find such proof from the charts that have been offered in evidence. [Emphasis added.]

The charts (which summarized the betting, wins and patterns) were properly admitted into evidence, and the jury was correctly informed that they could consider them. The court did not "conclusively determine" (Perry, 53) the issue of whether the charts were indicative of a "tout scheme" or bribery, rather he merely informed the jury "you may find such proof [that the goals of the conspiracy, i.e., making money via bribery, were accomplished] from the charts." (Emphasis added.) This charge was correct.

Other claims that the judge decided fact issues properly left to the jury are insubstantial. For instance, defendants urge that the court erred when he informed the jury that "recantation of sworn testimony is always open to a certain degree of suspicion, and should be received with caution." (Gerry, 61; Tr. 10,029). This instruction was correct. See., e.g., Devitt and Blackman, Federal Jury Practice, 12.05, 72.03 (2nd Ed. 1970). Similarly, the court's instruction that "a witness' recollection is likely to be better at a time closer to the event about which he is testifying" and thus the

recanting witness' grand jury testimony may be more reliable than a later statement is also a correct statement of the law. Finally, the court correctly instructed the jury that in evaluating witnesses they could consider potential bias such as self-interest (Perry, 56). See McCormick on Evidence, §40 (Cleary Ed., 1972).

The defendants also contend that the court improperly commented on the evidence. It is, of course, well settled that a federal trial judge may comment on the evidence so long as he makes it apparent that the jury's opinion as to the facts control. E.g., United States v. Haynes, 291 F. 2d 166 (2nd Cir., 1961). The court's comments were well within permissible bounds (e.g., T. 9,981). Thus, the court could properly point out that the motives of Pullman in secretly recording conversations could be considered and that he found "interesting" the fact that Pullman insisted on a grant of immunity, rather than relying on the various promises he had recorded.

Similarly, the court's instruction to the jury that if they believed the testimony of Cantor (that he had accepted money from Gerry to finish out of the money) then the offense of sports bribery was completed even if Cantor rode to win, is a correct statement of the law. See, 18 U.S.C. 224(a). Nor did the court err in instructing the jury that if they believed driver Randy Perry's testimony, then the conversation he described "may be construed as an offer for a bribe"

(emphasis added) although Gerry, after being rebuffed by Randy Perry, had stated he was only testing the other's honesty (Perry, 54).

In sum, it is apparent that if the court's charge did indeed injure the defendants, it was because the charge accurately pointed out to the jury the inferences which could properly be drawn from the evidence adduced at trial.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of conviction should be affirmed.

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GOVERNMENT'S ADDENDUM

The following is a separately paginated portion of the trial court's draft transcript of conversations on April 21, which was omitted from defendants' appendix:

1.[34/] --yeah I know. -- You say really? Symore, you don't understand. Whether I arrest you for bein' a hostile witness, or more cooperative witness -- What'd ya mean? I'll blow your case apart. They want me to take the stand. Symore -- I'll blow the case rather than walk away. Then I says, Symore, why do you want to be a shmuck. Here's Jerry Cohen. You will be a congenital idiot. What'd he say about me? Called you an idiot. Said -- testify about it.

--

Look. I talked to Dillon Friday about it. This is totally bein' honest. I asked Dennis what he thought about findin' out asking you to take a plea.

2. Which means what?

1. Nothing. You wouldn't plead guilty, you just walk away. Right? He was totally against it.

2. --

1. Now, I'm gonna try another -- I'm gonna try it again, tomorrow afternoon. I, X --

2. -- testimony --

1. No. He won't buy that.

2. He won't buy it.

1. Let me ask you this. If you take a plea, then everybody's acquitted. If I agree, you can withdraw the plea after the case is over.

2. I don't understand it. I'm no lawyer.

1. --

2. I don't understand what the hell is --

34/ These numbers generally correspond to the following speakers: 1. Pollack, 2. Rothstein, 3. Pullman.

1. All right. Here's -- Every one's acquitted. We will agree for value to withdraw that plea of guilty; so, there is no plea, just taken out after -- at that point.

(background music)

2. How the hell can you do it?

1. You're allowed to withdraw a plea. You can withdraw a plea of guilty.

2. You know, Fanning and the other guy says you crossed to the judge.

1. Who?

2. You.

1. The judge and I go back a long way together. Look! Can we go off the record?

2. Everything's off the record, I mean, you know.

1. Joe. No way you gonna go to jail. No way.

2. Fine, but you know, this -- What I wanna know, the workings. I don't know --

1. Here's what I --

2. (Cont'g.) -- to the judge, or I donno' what's goin' on.

1. No way the judge put you in jail. Let me ask you this. What I'm suggesting is this. You don't want -- because you're afraid of these guys to the wall? If Dillon won't agree to a lack of a plea, and it's his decision. I cannot --

2. Yeah.

1. Would you agree?

1. Which you agree to plead guilty.

(Background music)

1. Anybody else -- If everyone else walks, that's the end of the case. You'll come in and say I want to withdraw my plea and I'll tell you exactly what grounds we'll do it on, - the basis there was no conspiracy proved clear.

3. (SYMORE)

It's my word against yours. What the hell --

1. What?

3. I throw my shield away here, I'm dead. I'm very -- You know; if I testify, I bury myself.

1. That doesn't matter. If I tell you, you'll be allowed to withdraw your plea, you'll be allowed to withdraw it. There's nothing stronger than my word on it. You got my word on it.

3. Uh, I got your word, huh?

1. I tell you I'm gonna --

3. If they're tellin' me stories, I don't know. I gotta see the judge.

1. --

3. And I don't know how close you are to the judge. That's what I'm concerned about. You know, they keep --

1. I have never had a man sentenced before this judge, who has testified, who did not get a suspended sentence.

3. That you ask?

1. Right.

3. In other words, you talked to this judge prior to this?

1. We tell him the man has been cooperative, the basic --

3. What do you mean "We tell him"? You and Dillon?

1. I tell him. If Dillon -- Dillon has come up on occasion, but -- where to the Government. I, I spoke to him for the Government.

3. In other words, you and the judge are good friends.

1. The judge and I have tried many cases together -- He's written my letter of recommendation for admission to the New York bar.

3. --

1. I talked to him on several occasions. My problem in this case is Meyerson talked to BILL FARETHEE before I started.

3. Why?

1. He just wasn't capable of handling something this big. There were questions which were not asked in the Grand Jury and there were representations made which we couldn't -- Dave Kraft will walk. Dave Kraft will --

3. He'll walk, huh? I come in and bring Connie Rogers for a witness.

1. Connie would lie. She's states she hasn't been in two years.

3. That's why I want to have it most -- How come she does come here then? Did you have somethin' to do with it?

1. Yeah.

3. In other words, you talked to the judge.

1. Uh-huh. Absolutely.

3. Behind closed doors on that?

1. --

3. Yeah, but still, I didn't know -- I don't know. You, you, - the first

3. (Cont'g.) -- thing you tell me you and the judge is close.

1. We are --

3. --

1. I stated this judge has never sentenced a man that I've recommended against sentencing, but there's a first time for everything.

3. Yeah, and I don't need that bullshit.

1. I know you --

3. What do I need it?

1. Well, I can't make a guaranty to you, if that's what you're lookin' for?

3. Yees, sure, I'm lookin' for a guaranty.

1. Can't do it. Joe, I can tell you that there's no way you're goin' to get --

3. Well, what's, what the hell good is it then? It's -- then it's not beneficial to me to testify then. I feel that way. What can I do? There's no sense me goin' on the stand and bury myself -- insane. I mean here's a guy, KANTOR he gets -- if anybody should have a problem, it's him. There's another guy, that Del. What the hell's goin' on here?

1. Del's committed no crime. Del --

3. He's signed fraudulent BACKERS. He was in the presence of people. He knew signed fraudulent backers -- this man --

1. Joe --

3. He knew it wasn't even his stuff.

1. The Circuit Judge --

3. He's supposed to call somebody.

1. --

1. And that's a violation of Federal law.

3. What the hell. You got Henry. You got the other guy.

1. Who?

3. Well, you got Kantor. You got the other guy.

1. Who?

3. Like, un --

1. Which other guy?

3. Uh, Del.

1. Del?

3. I tell you everybody gets him --

1. -- to --

3. And I'm here, I can't --

1. --

3. What about Perry?

1. No, sir. Didn't want it.

3. What about Kantor?

1. Kantor, yeah.

3. He gave him immunity. Why?

1. He testified.

3. He didn't even testify to what you wanted.

1. We didn't -- We're gonna go back in there -- but Alan is impossible.

3. You made a deal with him and then you didn't even, un -- He didn't go through with it or whatever.

1. Alan, - well I came over here.

3. I gotta be a total fool.

1. How do you figure that?

3. Who the hell -- I got nothin' goin' for me. I throw away my shield and I'm dead.

1. You've thrown it away already.

3. What?

1. You testified before the Grand Jury; right?

3. So?

1. You got to testify to that.

3. I got it -- I can have it. At that point in time, I thought that way. This time -- I thought the end of a strike, I can think another way.

1. But you can't kid yourself, Joe.

3. I can't --

1. Any judge is going to sock it to you.

3. Well, if he socks it to me, all well and good, but --

1. Why --

3. (Cont'g.) -- the other guys tell me everythin's all right. You and the judge are good friends and all. So what, what the hell? No u can't do nothin'. The other guy's a fag and, uh, my agent over there --

1. I think -- you gonna go to jail?

3. Uh?

1. Joe, I'm tellin' you, you're not goin' to go to jail.

3. I can't -- it's just insane. I mean, I'm, you know, I'm only a dumb truckdriver, but I got sense enough to know.

1. Now don't you think --

3. I got --

1. Ben Grant's got more to lose than you do right now?

3. What has he got to lose?

1. He's got the businesses.

3. He's got the businesses. He's got the money, too. What's he got to lose?

1. He's got the business.

3. What has he got to lose? He's tellin' me. The guy's tellin' me about a millionaire's got a million dollars. He's got more to lose than a guy who's got ten thousand.

1. He's got more to lose than tryin' what he's built up in a lifetime right now, than you do.

3. Oh, fine. Fine, but he's got it. What the hell's to lose.

1. He doesn't want to go to jail, either.

3. He's sittin' on a quarter of a million, or a half a million dollars.

1. He's not goin' to jail though.

3. Good for him. I'm worried about me. I'm -- I gotta go -- I gotta face this. I ain't worried about how much he's got.

1. You're not gonna go either.

3. You're tellin' me. What assurance I got?

1. I can't give you any assurance, but my word.

3. Huh -- It's no good? You can't give me no assurance.

1. Well, what're ya gonna do?

3. I can't do -- Ah, it's just impossible. I mean, I throw away my shield and I got --

1. What shield? You threw it away already.

3. You say I threw it away. I don't feel I threw it away. I mean I was fair with you people all the way through here and you're givin' everybody immunity. I, I --

1. Two people got immunity.

3. (Cont'g.) I feel like, uh, one of them oppressed colored people -- they gotta picket and everythin' -- and for what?

1. Well, let's go over your testimony and I'll talk to Dillon in the mornin'. I'll talk to you in the mornin'.

3. I don't want to go over nothin'. Forget about it. That's how I feel. I mean I don't want to be a ballbuster.

1. -- that way.

3. I don't want to do this. I don't want to do that, but they give me all kind of assurances and you give me nothin'. FATTY and the other guy, they give me all kind of assurances. I cooperate. I do this. I do that. Then, uh, I get this far and --

1 What'd you say?

3. (Cont'g.) -- I get a shot -- I wind up with holy water.

1. What'd you expect? Tell me exactly what you'd be assured.

3. What I be assured of? They told me you're close to the judge and you talk to him and there'd be no problem to hit the way you tell him to.

1. That's right. That part's true.

3. And, uh, I figured I gotta get testimony immunity.

1. And if you don't?

3. Forget it -- 'F I gotta go to jail, fine. I go to jail.

x

1. So, you're foolish to testify anyway?

3. Why? You could force me to testify. I'll testify, you know, what I feel is the truth.

1. What story will you testify to?

3. Well, I could have a change of mind, you know.

1. --

3. What I thought the truth was then and I think it is now, after all the facts are out.

1. Joe, I can't tell you enough if you're attitude is -- will not bear fruit. You're not gonna get hurt.

3. You say I'm not gonna get hurt. I don't know. I don't know how you know this judge or anything. I don't know what the hell's goin' on. I don't know how things transpire.

1. Let me tell you this. I give you testimony immunity.

3. Right.

1. You turn around right away after --

3. -- to take testimony immunity. You can't do nothin' to the defendants in the case.

1. We certainly can.

3. Why?

1. Testimony immunity -- There's two types of --

(END OF TAPE)

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
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and Refer to Initials and Number

January 6, 1975

TMB:mjd

Honorable A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
New York, New York 10007

Re: United States of America v.
Forrest Gerry and Richard Perry
No. 74-2100

Dear Mr. Fusaro:

Pursuant to my letter of January 2, in which I forwarded four xeroxed copies of the proofs of the brief in the above-captioned case, I am enclosing for filing twenty five copies of the printed brief.

Copies have this day been mailed to counsel for appellants.

Sincerely,

Terence M. Brown

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